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No. 92-1238

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TOM UDALL
Attorney General of the State of New Mexico
MARIAN MATTHEWS
Deputy Attorney General
ROBERT TABOR BOOMS
PHYLLIS A. DOW
DAVID M. KAUFMAN
[Counsel of Record]
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6000
Counsel for Petitioners

March 8, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Petitioners file this Reply Brief in Support of Petition for Writ of Certiorari in order to clarify three points raised by respondents. Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 22, 1992, for the reasons stated in their Petition. Or, in the alternative, petitioners respectfully request the Court to vacate that portion of the court of appeals' opinion affirming the award of $446,277 per year and remand for further consideration.

REASONS FOR GRANTING THE WRIT

I.

Petitioners Do Not Seek a Writ of Certiorari to Review the Trial Court's Findings of Fact and Conclusions of Law.

Respondents assert that petitioners actually seek a review of the findings of fact and conclusions of law of the trial court and have not raised a credible issue based upon the Eleventh Amendment. They refer to certain of the statements petitioners made in their Statement of the Case, claiming them to be either an attack on the trial court's findings or misleading statements of fact. (Respondents' Brief in Opposition at 4 n.2 & 9 n.4.) However, those statements should be viewed in the context of the Statement and not as challenges to the court's factual findings. If one were to follow respondents' logic, it would mean that the Statement of the Case could only include the court's actual findings and conclusions and no references to testimony of the witnesses.

Petitioners clearly indicated in their Statement of the Case that "the accuracy of the findings of the district court and the [asserted] misapplication of the *Feeney* standard by the courts below will not be addressed further in this petition." (Petition at 8 n.4.) Petitioners are not requesting that this Court review the trial court's findings of fact to determine if they were clearly erroneous. Petitioners have simply noted that they continue to deny the respondents' claims of purposeful discrimination. That does not constitute a challenge to the findings at this stage of the proceedings. Nor, as inferred by respondents,

does it justify an assumption that petitioners will continue to discriminate against the Navajos in the future.

Further, respondents have mischaracterized petitioners' argument that the relief granted constitutes an abuse of discretion by the trial court. Petitioners do not base this Petition on an attack of the trial court's findings of fact and conclusions of law, but rather challenge the nature of the relief awarded in the overall framework of the case. Petitioners claim the trial court's findings and conclusions do not support, in the context of Eleventh Amendment jurisprudence, an award of $446,277 every year from 1991 forward unless a lesser need for services can be demonstrated. Even though the trial court's findings and conclusions were upheld by the appellate court, that does not prohibit a challenge to the relief granted as being an abuse of discretion under the Eleventh Amendment.

The focus of petitioners' argument is two-fold. First, they assert that the award of $446,277 per year is not truly ancillary to any other injunctive relief and, therefore, violates the Eleventh Amendment. Second, they claim that the court's findings of fact and conclusions of law do not clearly establish a sufficiently grievous ongoing violation of the respondents' rights to support the relief granted.

Respondents forward the proposition that, because petitioners deny today that their action was one of purposeful discrimination, petitioners will continue to discriminate against the Navajos, thus justifying the award

as one to rectify an ongoing violation. They state: "petitioners are neither ready, nor willing to remedy the deprivation of constitutional rights themselves." (Respondents' Brief in Opposition at 14.) What they fail to acknowledge is the very heart of petitioners' argument: the trial court **did not** give state officials an opportunity to adjust the funding decision. The court **did not** give petitioners any realistic leeway whatsoever in making its future funding decisions. Rather, the court in essence fined the State of New Mexico for what it perceived to be a past act of discrimination. That action violates Eleventh Amendment tenets and impermissibly interferes with the state's ability to make its own decisions regarding program policies and funding allocations.

II.

Petitioners Need Not Return to the Trial Court to Seek Relief Prior to Petitioning This Court for a Writ of Certiorari.

Respondents claim that petitioners "always have the option of moving the district court to modify the relief granted if the facts underlying the injunction have changed." (Respondents' Brief in Opposition at 10 n.6.) However, petitioners should not be forced to return to the trial court prior to seeking relief from this Court. It is petitioners' position that the relief **based upon the record as it currently exists** violates Eleventh Amendment tenets. To return to the trial court at this juncture would be simply to reargue what was before that body previously. That would be a futile effort and a waste of judicial resources. The issue is not whether circumstances have

changed since the court's decision, but rather whether the court's award was constitutional in the first instance.

In any event, changes in the manner in which the funding was determined for the Navajo Nation had already occurred prior to trial and were presented to the trial court. Thus, there is no reason to believe that the court would view them any differently at this juncture.

Respondents assert that petitioners have admitted that $446,277 "was the appropriate baseline level of funding for Navajo social services in 1985." (Respondents' Brief in Opposition at 15.) That is a misstatement. The trial court awarded $446,277 per year "unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country." (Petition App. at 24.) Petitioners do concede that, for the foreseeable future, the state will probably not be able to demonstrate that the Navajos' need for Title XX services has lessened. However, that does not justify tieing the state's hands when making its funding decisions concerning the Title XX program to the exclusion of all of the other populations which it serves.

Reality teaches us that no governmental program ever has sufficient funds to fully meet the needs which it was designed to address. Therefore, state officials must evaluate the needs and make appropriate funding decisions. Those decisions will not always be perfect, nor will they necessarily satisfy everyone. However, it is important that the states be given the first opportunity to make those decisions and that their discretionary powers not be completely removed, as happened in the case at bar.

III.

Certiorari Should Not Be Denied on the Basis that the Funds at Issue Are Federal Funds.

Respondents make a brief reference to the fact that the funds at issue, Title XX funds, are federal funds and claim that obviates the need for any Eleventh Amendment analysis. Petitioners did note in their Writ that there is a split among the circuits on the issue of whether federal funds or a mixture of state and federal funds merit Eleventh Amendment protection. (Petition at 12 n.6, *citing Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. denied sub nom, Paschal v. Didrickson*, 112 S Ct. 992 (1992) (White, J., dissenting).) However, it is petitioners' position that this Court should not deny certiorari on the ground that Title XX funds are federal, not state, monies.

Respondents have never raised this issue previously. Both the trial court and the appellate courts assumed, consistent with *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), that Title XX funds are state funds for purposes of the Eleventh Amendment and attempted to fashion relief which was consistent therewith. Petitioners agree with the lower courts that the Eleventh Amendment applies to Title XX funds and do not forward this as a basis upon which to grant certiorari. Petitioners submit that it would be inappropriate to deny certiorari on an issue which was not raised previously, for which the factual record was not developed, and which has not been fully addressed by the lower courts.

CONCLUSION

In sum, petitioners seek a review of the trial court's decision on the basis that it violates the Eleventh Amendment to the United States Constitution. Their position is not frivolous, as suggested by respondents. Nor, should they be forced to return first to the trial court prior to seeking relief from this Court. For the foregoing reasons, the petition for certiorari should be granted. In the alternative, petitioners respectfully request the Court to vacate that portion of the court of appeals' opinion affirming the award of $446,277 per year and remand for further consideration.

Respectfully submitted,

TOM UDALL
Attorney General of the
State of New Mexico
MARIAN MATTHEWS
Deputy Attorney General
ROBERT TABOR BOOMS
PHYLLIS A. DOW
DAVID M. KAUFMAN
[Counsel of Record]
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6000
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